

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Case No. 02-82361
Chapter 11 Case

Tricord Systems, Inc.,

Debtor.

James Bartholomew, as Trustee for the
Liquidating Trust of Tricord Systems,
Inc.,

Adv. Pro. No. 03-4174

Plaintiff,

**GENERAL ELECTRIC CAPITAL
CORPORATION'S
MEMORANDUM ON DAMAGES**

vs.

General Electric Capital Corporation
and Adaptec, Inc.,

Defendants.

On August 27, 2004, the United States District Court for the District of Minnesota (the "District Court") issued a Memorandum Opinion and Order Affirming in Part and Reversing in Part the Orders of the Bankruptcy Judge (the "Memorandum Opinion") remanding the instant action to this Court for further factual and legal determinations. Specifically relevant to James Bartholomew's (the "Trustee") breach of contract claim against General Electric Capital Corporation ("GECC"), the District Court instructed this Court to determine the amount of the "Lessor's Loss" as that term is defined by the Master Lease Agreement (the "Lease") between GECC and Tricord Systems, Inc. ("Tricord"). Memorandum Opinion, p. 17. The District Court further instructed this Court that if it determined that GECC drew more on the letter of credit (the "LOC") than the amount of the "Lessors Loss," then this Court was to determine whether, in light of the assignment of the Lease to Adaptec, Inc. ("Adaptec"), the Trustee can pursue a claim

for breach of contract against GECC. *Id.* The District Court also remanded this matter for further factual determinations relevant to the Trustee's subrogation claim against Adaptec. *Id.* at 12.

Following the District Court's Memorandum Opinion, this Court on October 4, 2004, issued an Order for Hearing on Remand (the "Order"). The Order states:

This adversary proceeding was remanded by the district court for a determination of damages against defendant Adaptec, Inc., on plaintiff's subrogation claim.

The Order goes on to schedule a hearing "to hear parties' arguments on the proper damages to be included in the court's judgment on remand" and to order the Trustee and Adaptec to file memoranda on the issue of damages by October 29, 2004.

The Order is silent on the issues pertaining to GECC. Adaptec, however, has previously argued to this Court that, under the Trustee's subrogation claim, damages against it are limited by the amount of Tricord's obligation to GECC under the terms of the Lease:

The case law that I reviewed in responding to this motion says instead that a subrogee is entitled to indemnity to the extent only of the money actually paid to discharge the obligation.

Transcript of Hearing on Motion before the Honorable Robert J. Kressel, February 18, 2004, p. 5.¹

Without taking a position on whether Adaptec has correctly stated the law on this issue, GECC, out of an abundance of caution, submits this memorandum in order to preserve its arguments as to the amount of the "Lessor's Loss" to the extent, if any, the Court is persuaded

¹ A true and correct copy of the relevant excerpts of this hearing is attached to the Affidavit of Michael A. Rosow as Exhibit A.

that its determination of damages against Adaptec has any bearing upon the amount of the “Lessor’s Loss.”²

THE “LESSOR’S LOSS” WAS \$204,171.38

In its Memorandum Opinion, the District Court found that “GECC’s draw [on the LOC] was proper because the uncontested facts set out at trial establish that Tricord defaulted [under the Lease].” Memorandum Opinion, p. 17. Under the terms of the Letter of Credit Addendum (the “Addendum”) GECC was therefore entitled to “draw all amounts available under the LOC but in no event more than an amount equal to the Lessor’s Loss (as defined in Section 15 of the Agreement).” Addendum.³ Under Section 15 of the Lease, the Lessor’s Loss is comprised of

all Rent and other amounts to become due by acceleration or otherwise (plus, if the System is not returned in accordance with Section 9 of the applicable schedule an amount equal to (i) Lessor’s reasonable estimate of the fair market value of the System at the end of the applicable term if lessee selects purchase option B in the schedule ...).

Lease, p. 2.⁴

This Court has previously determined that the present value of the unpaid Lease payments was \$150,000. Memorandum Order, January 23, 2004, p. 5. This amount is in accordance with the terms of the Lease and has not been contested.

Because the System (as that term is defined in the Lease) was not returned to GECC, GECC is also entitled to the additional sum comprising GECC’s reasonable estimate of the fair market value of the System at the end of the Lease term. Lease, p. 2. This amount is by definition included in the amount of the “Lessor’s Loss.” *Id.* At trial, Mark Chabra, the manager

² Because the Court’s Order limits the November 3, 2004, hearing to determining damages against Adaptec, GECC will not address whether, in light of the assignment of the Lease to Adaptec, the Trustee can bring a claim for breach of contract against GECC in this memorandum. Instead, GECC reserves its arguments on this issue until such time as the Court requests briefing on that issue.

³ A true and correct copy of the Addendum is attached to the Affidavit of Michael A. Rosow as Exhibit B.

⁴ A true and correct copy of the Lease is attached to the Affidavit of Michael A. Rosow as Exhibit C.

of GECC's \$85 million telecommunications portfolio, including \$50 million of telecommunications equipment from the same manufacturer as the System, testified that he was responsible for "set[ting] residual values for this equipment, and establish[ing] fair market values for this equipment as well." Transcript of Trial before the Honorable Robert J. Kressel, January 13, 2004 ("Trial Transcript"), pp. 49-50.⁵ Chabra testified that GECC reserved a residual value for the System of 21% of the purchase price of the System, which results in a residual of \$40,789.77. *Id.* at 50. Chabra further testified that this amount most likely undervalues the System, which GECC typically is able to sell for 30% of the purchase price. *Id.* Based upon GECC's experience reselling the System at 30% of its original cost, GECC's residual value of the System at 21% of its original cost is a reasonable estimate of the fair market value of the system at the end of the Lease term.

At trial, the Trustee offered the testimony of Mark McAlister. McAlister testified that he valued the System by "parting it out" and selling those components of the System that he could sell within 90 to 120 days. Trial Transcript, pp. 10 and 14. Using this methodology, McAlister valued the System at \$9,660.⁶ *Id.* at 16-17. This valuation methodology, however, ignores the terms of the Lease and does not directly challenge the reasonableness of GECC's estimate of the fair value of the System at the end of the Lease term.

First, the Lease requires that the valuation be "Lessor's [GECC's] reasonable estimate of the fair market value of the System at the end of the applicable Term." Lease, p. 2. McAlister's testimony never established that GECC's valuation of the System was not reasonable nor did McAlister ever state an opinion as to the reasonableness of GECC's valuation.

⁵ A true and correct copy of the relevant excerpts of the Trial Transcript are attached to the Affidavit of Michael A. Rosow as Exhibit D.

⁶ This amount reflects a valuation of \$5,460 for the Minneapolis System and \$4,200 for the Colorado System.

Second, McAlister's valuation methodology, as he admitted at trial, ignores the fact that the System remained an installed and operating system, and was not removed, disassembled, and sold for parts. Trial Transcript, p. 13.

McAlister further testified, however, that when the System is valued on an installed basis, as set forth in the Lease, the value of the System would be \$48,180.⁷ *Id.* at 19-20. This valuation supports GECC reasonable estimate of the fair market value of the System at the end of the Lease term.

To unpaid Lease payments and GECC's reasonable estimate of the fair market value of the System, sales tax is also included in the amount of the "Lessor's Loss." At trial the tax rate was established at 7.0138%. This rate is a blended rate based on the value of the equipment in Minnesota and Colorado and the respective property tax rates in each of these states. Mark Chabra testified that this rate was used by GECC during the term of the Lease. Trial Transcript, pp. 53-55. This rate is incorporated into Stipulated Exhibit 1 by dividing the tax base of \$257.69 by the monthly lease payment of \$3,674.01. Applying this sales tax rate to the unpaid Lease payments and the fair market value of the System the total amount of sales tax due is \$13,381.61.⁸

Considering these various elements, the amount of the "Lessor's Loss" equals \$204,171.38. To the extent that any determination of the Trustee's damages on its claims against Adaptec implicate the amount of the "Lessor's Loss," GECC expressly requests that the Court find the "Lessor's Loss" to be calculated as provided herein.

⁷ This amount reflects the initial parts value of \$9,660 plus installation costs of \$21,600 and \$16,920 for the Minneapolis and Colorado Systems respectively.

⁸ This amount is calculated as follows: $(\$150,000 + \$40,789.77) \times 7.0138\% = \$13,381.61$.

CONCLUSION

Should the Court find that its determination of damages against Adaptec have any effect on the amount of the “Lessor’s Loss,” GECC submits that it has an interest in these proceedings and respectfully requests that the Court find that the amount of the “Lessor’s Loss” is \$204,171.38.

Dated: October 29, 2004

FABYANSKE, WESTRA & HART, P.A.

By: /e/ Michael A. Rosow
Paul L. Ratelle (#127632)
Michael A. Rosow (#317998)
800 LaSalle Avenue, Suite 1900
Minneapolis, MN 55402
(612) 338-0115
ATTORNEYS FOR DEFENDANT
GENERAL ELECTRIC CAPITAL
CORPORATION

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Case No. 02-82361
Chapter 11 Case

Tricord Systems, Inc.,

Debtor.

James Bartholomew, as Trustee for the
Liquidating Trust of Tricord Systems,
Inc.,

Adv. Pro. No. 03-4174

Plaintiff,

vs.

**AFFIDAVIT OF
MICHAEL A. ROSOW**

General Electric Capital Corporation
and Adaptec, Inc.,

Defendants.

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Michael A. Rosow, being first duly sworn upon oath, deposes and states as follows:

1. I am an associate attorney with the law firm of Fabyanske, Westra & Hart, P.A., attorneys for defendant General Electric Capital Corporation in this matter.
2. Attached hereto as Exhibit A is a true and correct copy of the relevant excerpts of the Hearing on Motion before the Honorable Robert J. Kressel, February 18, 2004.
3. Attached hereto as Exhibit B is a true and correct copy of the Letter of Credit Addendum.

4. Attached hereto as Exhibit C is a true and correct copy of the Master Lease Agreement.

5. Attached hereto as Exhibit D is a true and correct copy of the relevant excerpts of the Transcript of Trial before the Honorable Robert J. Kressel, January 13, 2004.

Further your affiant sayeth not.

/s/Michael A. Rosow
Michael A. Rosow

Subscribed and sworn to me before
this 29th day of October, 2004

/s/Mary Allen
Notary Public

1. UNITED STATES BANKRUPTCY COURT
2. DISTRICT OF MINNESOTA
3. MINNEAPOLIS, MINNESOTA
4. In re:) Docket BKY 02-82361
5.)
6. TRICORD SYSTEMS, INC.,)
7.)
8. Debtor.)
9.)
10. JAMES BARTHOLOMEW, TRUSTEE,) Docket ADV 03-4174
11.)
12. Plaintiff,)
13.)
14. v.)
15.)
16. GENERAL ELECTRIC CAPITAL)
17. CORPORATION and ADAPTEC,)
18. INC.,) Minneapolis, Minnesota
19.) February 18, 2004
20. Defendants.) 2:00 p.m.
21.)

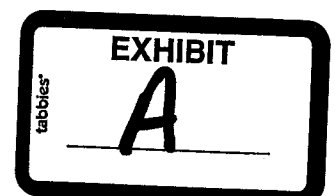
22. TRANSCRIPT OF HEARING ON MOTIONS
23. BEFORE THE HONORABLE ROBERT J. KRESSEL
24. UNITED STATES BANKRUPTCY JUDGE

25. APPEARANCES:

26. For Plaintiff: SCOTT JOHNSON, ESQ.
27. Johnson Law Group
28. Suite 120
29. 10801 Wayzata Boulevard
30. Minnetonka, Minnesota 55305
31. For Defendant Adaptec, Inc.: CHRISTOPHER MCCULLOUGH, ESQ.
32. Gray, Plant, Mooty, Mooty
33. & Bennett
34. Suite 3400
35. 33 South 6th Street
36. Minneapolis, Minnesota 55402

37. (Appearances continued on page 2.)

38. WALLS & WALLS
39. Official Transcribers for U.S. Bankruptcy Court
40. 12124 Hampshire Avenue North
41. Champlin, Minnesota 55316
42. (763) 422-8938



1 The case law that I reviewed in responding to
2 this motion says instead that a subrogee is entitled to
3 indemnity to the extent only of the money actually paid to
4 discharge the obligation. Now as the record is that the
5 trial record is not entirely clear about the dollar
6 amounts, what I would submit, Your Honor, is that applying
7 that measure of damages under a subrogation theory without,
8 of course, waiving Adaptec's right to appeal on the
9 underlying issue applied to the facts here it would seem
10 that the amount of the draw that GE took from Wells Fargo
11 should be the amount that would be the cap, if you will, on
12 any subrogation theory of damages because that was the
13 amount used to pay to discharge the obligations on the
14 lease in this case Tricord's obligations on the lease to
15 GE.

16 So with that, Your Honor, we would respectfully
17 request that Your Honor deny Plaintiff Trustee's motion.

18 Thank you.

19 THE COURT: Mr. Ratelle, do you have anything on
20 the Plaintiff's motion?

21 MR. RATELLE: I have nothing on this, Your Honor.

22 THE COURT: Did you want to add anything, Mr.
23 Johnson?

24 MR. JOHNSON: I don't, Your Honor.

25 THE COURT: Well, I mean, I guess that is why

Lessor GENERAL ELECTRIC CAPITAL CORPORATION

Letter of Credit Addendum

Lessee TRICORD SYSTEMS INC.

Agreement No./Schedule No.
6923229-001

Contemporaneously with entering into the Schedule to the Agreement ("Agreement") referenced above, Lessor and Lessee hereby agree to the addition of the following new Section:

Letter of Credit. For the purpose of securing Lessee's performance of its obligations under the above referenced Lease, Lessee agrees to cause an irrevocable standby letter of credit ("LOC") to be issued to Lessor in the amount described below in United States Dollars. The LOC shall be issued by a United States bank and on terms, both of which are acceptable to Lessor. The LOC shall be for a one (1) year period and automatically renewed annually thereafter. No less than thirty (30) days prior to the present or future expiration date of such LOC, as it may be amended or extended, or any subsequent LOC delivered to Lessor pursuant to this Section, Lessee shall furnish to Lessor a renewed LOC for another one (1) year period. Unless otherwise provided herein, Lessee shall continue to supply a renewal LOC through the expiration date of the Initial Term of the Lease. Lessee may not change the bank issuing the LOC or the form or amount of the LOC without Lessor's prior written consent. Lessee's failure to comply with the provisions of this Section shall constitute an Event of Default as defined in Section 14 of the Agreement entitling Lessor to exercise its remedies pursuant to Section 15. In addition, upon the occurrence of an Event of Default, Lessor may draw all amounts available under the LOC but in no event more than an amount equal to Lessor's Loss (as defined in Section 15 of the Agreement). Any proceeds of the LOC shall be applied toward Lessor's Loss. The delivery of the LOC to Lessor shall not relieve Lessee from its responsibility to fully perform all of its obligations under the Lease including, without limitation, its obligation to pay all amounts as and when due. Lessee shall not, under any circumstance, be entitled to setoff or apply any of its obligations to Lessor against all or any part of the LOC.

Notwithstanding the foregoing, provided that no Event of Default has occurred, or no event has then occurred which, with the giving of notice or passage of time, or both, would constitute a default under the Lease, at any time after Lessee has timely paid the first eleven (11) payments of Rent and all other sums then due and payable under the Lease, and annually thereafter during the Initial Term, Lessee may, in writing, request that Lessor reduce the amount of the LOC. Upon Lessor's receipt of the request, Lessor shall be required to confirm its approval of the reduction of the amount of the LOC to an amount equal to any amounts then due and owing plus all Rents and other amounts to become due under the Lease.

The LOC shall be in an initial amount equal to \$194,237.00 (100%) percent of the Price set forth in the Lease. If the Price is increased as a result of a JCO or a CSO due to and/or adds, moves and changes, Lessee shall deliver to Lessor an additional LOC in an amount equal to the increase or a replacement LOC in an amount equal to the Price, as adjusted.

Error Reference source not found.

BY

Carol A. Rehder
Authorized Representative

PRINT NAME

CAROL A. REHDER

TITLE

Sr. Vendor Support Specialist

Error Reference source not found.

BY

Steven E. Opdah
Authorized Representative

PRINT NAME

Steven E. Opdah

TITLE


CEO

DATE

2/6/01

EXHIBIT

B

Lessor General Electric Capital Corporation				Master Lease Agreement			
Lessee Tricord Systems, Inc.				Contact Mr. Brad Schumacher			
Address 2905 Northwest Boulevard, Suite 20				Telephone Number 763-551-6326		Facsimile Number 763-551-5311	
City Plymouth County/Province Hennepin State/Country MN Zip Code 55441				Master Lease Agreement No. 6923229			
				Corporation <input checked="" type="checkbox"/>		Proprietorship <input type="checkbox"/>	
				Partnership <input type="checkbox"/>		Other <input type="checkbox"/>	
TERMS AND CONDITIONS (The Reverse side contains Terms and Conditions which are also a part of this Agreement)							
<p>1. LEASE: Lessor shall purchase and lease to Lessee the equipment and associated items ("Equipment") described in any Equipment Schedule ("Schedule") executed from time to time by Lessor and Lessee that makes reference to this Master Lease Agreement ("Agreement"). This Agreement shall be incorporated into each Schedule. When computer programs and related documentation are furnished with the Equipment, and a non-exclusive license and/or sublicense (collectively, "Software") is granted to Lessee in an agreement ("Supplier Agreement") with the suppliers (collectively, "Supplier") identified on the Schedule, Lessor, to the extent permitted, grants Lessee a similar non-exclusive sublicense to use the Software only in conjunction with the Equipment for so long as the Equipment is leased hereunder. The Equipment and Software include, but are not limited to, all additions, attachments and accessories thereto and replacements thereof (collectively, "System"). Any reference to "lease" shall mean with respect to each System, this Agreement, a Schedule, a Consent of Supplier, an Acceptance Certificate, any riders, amendments and addenda thereto, and any other documents as may from time to time be made a part thereof.</p> <p>As conditions precedent to Lessor's obligation to purchase any Equipment and obtain any Software, not later than the Commitment Date set forth on the applicable Schedule (a) Lessee and Lessor shall execute this Agreement, a Schedule, an Acceptance Certificate and other documentation contemplated herein, and (b) there shall have been no material adverse change in Lessor's financial condition. Upon Lessor's execution of a Schedule, Lessee assigns to Lessor its rights to receive title to the Equipment and any non-exclusive sublicense to use the Software described in the Supplier Agreement as of the day the System is delivered to the Installation Site set forth in the applicable Schedule but no other right or any warranty thereunder. In consideration of such an assignment and subject to the terms and conditions herein, Lessor agrees to pay to the Supplier the Price (as defined in Section 3 below) for the System pursuant to the Supplier Agreement, but not to perform any other obligation thereunder. Unless Lessee exercises its Purchase Option as set forth in the applicable Schedule, Lessee hereby assigns to Lessor all of Lessee's then-existing rights pursuant to the applicable Supplier Agreement effective upon the termination or expiration of the Term (as set forth in the applicable Schedule) for any reason.</p> <p>2. TERM, RENEWAL AND EXTENSIONS: If all other conditions precedent to a Lease have been met, the Lease Term for the System described on each Schedule shall commence on the date of Lessee's execution of an Acceptance Certificate ("Commencement Date"), and continue for the number of whole months or other periods set forth in such Schedule ("Initial Term"), the first such full month commencing on the first day of the month following the Commencement Date for commencing on the Commencement Date if such date is the first day of the month). If Lessee selects Purchase Option B or C in the applicable Schedule, on the expiration date of the Initial Term, the Lease shall be automatically renewed for a six-month period ("Renewal Term") unless, by giving written notice to Lessor six (6) months prior to the expiration date, the Lessee elects to terminate the Lease. After the Renewal Term, at Lessor's option, the Lease shall be automatically extended on a month-to-month basis until either party gives the other not less than thirty (30) days prior written notice of its intention to terminate the Lease. Any renewals and extensions shall be on the same terms and conditions as during the Initial Term. "Term" shall mean the applicable Initial Term, the Renewal Term, if any, and any extension thereof as provided herein.</p> <p>3. RENT AND PAYMENT: Lessee shall pay to Lessor all the rental payments as shown in the applicable Schedule ("Rent") during the Term of the Lease, except as such Rent may be adjusted pursuant to this Section and Sections 2 and 8 of a Schedule, plus such additional amounts as are due Lessor under the Lease. Rent shall be paid as designated in the applicable Schedule in advance on the first day of each Payment Period ("Rent Payment Date"). If the Commencement Date is not the first day of a calendar month (or other Payment Period), Lessee shall pay to Lessor, on demand, interim Rent prorated daily based on a 360-day year for each day from and including the Commencement Date to and including the last day of such month or other Payment Period.</p> <p>The Rent is based upon the Price of the System and the acceptance of the System by Lessee on or before the Commitment Date set forth in the applicable Schedule. The "Price" of the System shall be as set forth in the Schedule, and shall exclude all other costs, including sales or other taxes included in the Supplier Agreement as part of the purchase price. If the Price is increased or decreased as a result of a job change order ("JCO"), the Lessee authorizes Lessor to adjust the Rent. If the Commencement Date occurs after the Commitment Date, and Lessor waives the condition precedent that the</p> <p>4. DELIVERY: All transportation, delivery and installation costs (unless included in the Price) are the sole responsibility of Lessee. Lessee assumes all risk of loss and damage if the Supplier fails to deliver or delays in the delivery of any System, or if any System is unsatisfactory for any reason.</p> <p>5. NET LEASE: Lessee's obligations under each Lease are absolute, unconditional and non-cancelable and shall not be subject to any delay, reduction, setoff, defense, counterclaim or recoupment for any reason including any failure of any System, or any misrepresentations of any supplier, manufacturer, installer, vendor or distributor. Lessor is not responsible for the delivery, installation, maintenance or operation of any System.</p> <p>6. WARRANTIES: Lessor agrees that third-party warranties, if any, inure to the benefit of Lessee during the Term and on exercise of the Purchase Option. Lessee agrees to pursue any warranty claim directly against such third party and shall not pursue any such claim against Lessor. Lessee shall continue to pay Lessor all amounts payable under any Lease under any and all circumstances.</p> <p>7. QUIET ENJOYMENT: Lessor shall not interfere with Lessee's quiet enjoyment and use of the System during the Term if no Event of Default has occurred and is continuing.</p> <p>8. TAXES AND FEES: Lessee shall promptly reimburse Lessor, upon demand, as additional Rent, or shall pay directly, if so requested by Lessor, all license and registration fees, sales, use, personal property taxes and all other taxes and charges imposed by any federal, state, or local governmental or taxing authority, relating to the purchase, ownership, leasing, or use of the System or the Rent excluding, however, all taxes computed upon the net income of Lessor.</p> <p>9. DISCLAIMER OF WARRANTIES AND DAMAGES: LESSEE ACKNOWLEDGES THAT (a) THE SIZE, DESIGN, CAPACITY OF EACH SYSTEM AND THE MANUFACTURER AND SUPPLIER HAVE BEEN SELECTED BY LESSEE; (b) LESSOR IS NOT A MANUFACTURER, SUPPLIER, DEALER, DISTRIBUTOR OR INSTALLER OF ANY SYSTEM; (c) NO MANUFACTURER OR SUPPLIER OR ANY OF THEIR REPRESENTATIVES IS AN AGENT OF LESSOR OR AUTHORIZED TO WAIVE OR ALTER ANY TERM OR CONDITION OF ANY LEASE; AND (d) EXCEPT FOR LESSOR'S WARRANTY OF QUIET ENJOYMENT SET FORTH IN SECTION 7, LESSOR HAS NOT MADE, AND DOES NOT HEREBY MAKE, ANY REPRESENTATION, WARRANTY OR COVENANT, WRITTEN OR ORAL, STATUTORY, EXPRESS OR IMPLIED, AS TO ANY MATTER WHATSOEVER INCLUDING, WITHOUT LIMITATION, THE DESIGN, QUALITY, CAPACITY, MATERIAL, WORKMANSHIP, OPERATION, CONDITION, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, HIDDEN OR LATENT DEFECTS, OR AS TO ANY PATENT, COPYRIGHT OR TRADEMARK INFRINGEMENT. LESSEE LEASES EACH SYSTEM "AS IS, WHERE IS."</p> <p>LESSOR SHALL HAVE NO LIABILITY TO LESSEE OR ANY THIRD PARTY FOR ANY SPECIAL, DIRECT, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY SORT INCLUDING, WITHOUT LIMITATION, DAMAGES FOR PERSONAL INJURY, LOSS OF PROFITS OR SAVINGS, LOSS OF USE, OR ANY OTHER DAMAGES, WHETHER BASED ON STRICT LIABILITY OR NEGLIGENCE, WHETHER RESULTING FROM USE OF A SYSTEM OR BREACH OF A LEASE OR OTHERWISE, EXCEPT FOR DIRECT, SPECIFIC DAMAGES FOR PERSONAL INJURY OR PROPERTY DAMAGE TO THE EXTENT CAUSED BY LESSOR'S ACTIVE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.</p>							
Except as otherwise provided in Section 3 of this Agreement and Sections 2, 3, and 8 of a Schedule, any modifications, amendments or waivers to a Lease shall be effective only if mutually agreed upon in a writing, duly executed by authorized representatives of the parties.							
General Electric Capital Corporation				Tricord Systems, Inc.			
BY _____ Authorized Representative				BY  Authorized Representative			
PRINT NAME _____				PRINT NAME Steven E. Opdehl			
TITLE _____ DATE _____				TITLE CFO DATE 2/6/01			

MLA 11/1/99 Telecom Financial Services Legal Staff

EXHIBIT
Plaintiff

1

App. 119

EXHIBIT

C

IF LESSEE HAS ELECTED PURCHASE OPTION B OR C, ARTICLE 2A OF THE UCC MAY APPLY TO THE LEASE AND LESSEE MAY HAVE CERTAIN RIGHTS THEREUNDER. IF SO, LESSEE ACKNOWLEDGES THAT SUCH A LEASE IS A FINANCE LEASE AS DEFINED IN UCC §2A-103. TO THE EXTENT PERMITTED BY LAW, LESSEE HEREBY WAIVES ANY RIGHTS OR REMEDIES LESSEE MAY HAVE UNDER UCC §§ 2A-508-522 INCLUDING, WITHOUT LIMITATION, RIGHTS OF REJECTION, REVOCATION, CANCELLATION, GRANTING OF SECURITY INTERESTS, AND RECOVERY FOR BREACH OF WARRANTY.

10. INSURANCE: At its expense, Lessee shall keep each System insured against all risks of loss and damage for an amount equal to the installed replacement cost of such System with Lessor named as a loss payee. Lessee shall also maintain comprehensive general liability insurance, with Lessor named as an additional insured. All insurance policies shall be with an insurer having a rating of "B+" or better by A.M. Best Company, Inc., and be in such form, amount and deductibles as are satisfactory to Lessor. Each such policy must state by endorsement that the insurer shall give Lessor not less than thirty (30) days prior written notice of any amendment, renewal or cancellation. Lessee shall, upon request, furnish to Lessor satisfactory evidence that such insurance coverage is in effect. Lessee may self insure for such coverages only with Lessor's prior written consent.

11. CASUALTY: If any System, in whole or in part, is lost, stolen, damaged or destroyed, or is taken in any condemnation or similar proceeding (an "Event of Loss"), Lessee shall immediately notify Lessor. Lessee shall, at its option (a) immediately place the affected Equipment and Software in good condition and working order, (b) replace the affected item with like equipment or software in good condition and transfer clear title and any sublease to Lessor, or (c) pay to Lessor, within thirty (30) days of the Event of Loss, an amount equal to the Stipulated Loss Value ("SLV") as defined below, for such affected Equipment or Software plus any other unpaid amounts then due under the Lease. If an Event of Loss occurs as to part of a System for which the SLV is paid, a prorata amount of Rent shall abate from the date the SLV payment is received by Lessor. Upon payment of the SLV, title to the applicable Equipment and the sublease to the applicable Software shall pass to Lessee with no warranties, subject to the rights, if any, of the insurer.

The SLV shall be an amount equal to all future Rent from the last Rent Payment Date for which Rent has been paid to the end of the Term with each such payment discounted to present value at a simple interest rate of five percent (5%) per annum or the Lease Rate, as applicable, or, if such rate is not permitted by law, then at the lowest permitted rate, plus (a) if Lessee selects Purchase Option B, twenty percent of the product obtained by multiplying the total number of Rent payments shown on the Schedule for the applicable Term by the then periodic Rent, or (b) if Lessee selects Purchase Option C, the percent set forth in the Purchase Option C election in the Schedule times the Price as it may have been adjusted ("Percent Option Amount"). If Lessor receives any insurance proceeds, Lessor shall apply such proceeds to Lessee's outstanding obligations with any remaining sums to be delivered to Lessee.

12. INDEMNITY: Lessee shall indemnify Lessor against, and hold Lessor harmless from, and covenants to defend Lessor against, any and all losses, claims, liens, encumbrances, suits, damages, and liabilities (and all costs and expenses including, without limitation, reasonable attorneys' fees) related to the Lease including, without limitation, the selection, purchase, delivery, ownership, condition, use, operation of a System, or violation of a Software sublicense, or arising by operation of law (excluding any of the foregoing to the extent caused by the active gross negligence or willful misconduct of Lessor). Lessee shall assume full responsibility for or, at Lessor's sole option, reimburse Lessor for the defense thereof. This Section shall survive the termination of the Lease but not longer than the applicable statute of limitations.

13. TAX INDEMNITY: If Lessee selects Purchase Option B, the Lease is entered into based upon the assumptions ("Assumptions") that for federal, state, and local income tax purposes, Lessor shall be entitled to deduct, at the highest marginal rate of tax imposed on corporations, the maximum depreciation or cost recovery allowances provided in the Internal Revenue Code of 1986, as amended, and under state and local law in effect on the date Lessee executes the applicable Schedule. If, in its reasonable opinion, Lessor determines that its net after-tax economic yield or after-tax cash flow ("Net Economic Return") has been adversely affected as a result of a change in the Assumptions (a "Loss"), Lessee agrees to pay to Lessor, on demand, an amount which will cause Lessor's then Net Economic Return to equal the Net Economic Return that Lessor would have received had such Loss not occurred. Lessee shall have no right to inspect the tax returns of Lessor.

14. DEFAULT: Any of the following shall constitute an Event of Default: (a) Lessee fails to pay when due any Rent or other amount payable under a Lease that is not paid within ten (10) days of Lessee's receipt of written notice of nonpayment; (b) Lessee fails to perform any other material term in any Lease or other agreement given in connection with any Lease that continues uncured for twenty (20) days after Lessee's receipt of written notice thereof; (c) the inaccuracy of any material representation or warranty made by Lessee or any guarantor in connection with any Lease and the continuation thereof for thirty (30) days or more; (d) Lessee attempts to make a Transfer (as defined in Section 16) without Lessor's prior written consent; (e) Lessee dissolves or ceases to do business as a going concern; (f) Lessee sells all or substantially all of its assets, merges or consolidates with or into, or reorganizes with any entity; (g) Lessee becomes insolvent, makes an assignment for the benefit of creditors, files a voluntary petition or has an involuntary petition filed or action commenced against it under the United States Bankruptcy Code or any similar federal or state law; (h) Lessee fails to perform its obligations under any other Lease or agreement with Lessor; or (i) Any partner of Lessee or any guarantor takes any actions described in subsections (e), (f), or (g) above.

15. REMEDIES: If an Event of Default has occurred, Lessor shall have the right to exercise one or more of the following remedies set forth below. Lessor may (a) terminate and/or declare an Event of Default under any Lease or other agreement with Lessee (b) recover from Lessee all Rent and any and all amounts then due and unpaid and (c) recover from Lessee all Rent and other amounts to become due, by acceleration or otherwise (plus, if the System is not returned in accordance with Section 9 of the applicable Schedule, an amount equal to (i) Lessor's reasonable estimate of the fair market value of the System at the end of the applicable Term if Lessee selects Purchase Option B in the Schedule, or (ii) if Lessee selects Purchase Option C in the Schedule, the Percent Option Amount). The amounts described in subsection (c) shall be present valued using a five percent (5%) simple interest rate per annum or the Lease Rate, as

applicable, or, if such rate is not permitted by law, then at the lowest permitted rate. The amounts set forth in subsections (b) and (c) above shall be the agreed upon damages ("Lessor's Loss"). Lessor may also charge Lessee interest on the Lessor's Loss from the date of the Event of Default until paid at the rate of one and one-half percent (1-1/2%) per month, but in no event more than the maximum rate permitted by law; demand the Lessee return any System to Lessor in the manner provided in Section 9 of the Schedule; and take possession of, render unusable, or disable any System wherever located, with or without demand or notice or any court order or any process by law.

Upon repossession or return of a System, Lessor shall have the right to sell, lease or otherwise dispose of the System, with or without notice and by public or private bid, and shall apply the net proceeds thereof, if any, toward Lessor's Loss but only after deducting from such proceeds (a) in the case of any relating to the System, the rent due for any period beyond the scheduled expiration of the Lease; (b) in the case of sale, (i) if Lessee has elected Purchase Option B, the estimated fair market value of the System as of the scheduled expiration of the Term of the Lease, or (ii) if Lessee has elected Purchase Option C an amount equal to the Percent Option Amount; and (c) all expenses including, without limitation, reasonable attorneys' fees incurred in enforcement of any remedy. Lessee shall be liable for any deficiency if the net proceeds available after the permitted deductions are less than Lessor's Loss. No right or remedy is exclusive of any other provided herein or permitted by law or equity. All rights and remedies shall be cumulative and may be enforced concurrently or individually from time to time.

16. ASSIGNMENT: Lessor may, without notice to or the consent of Lessee, sell, assign, grant a security interest in, or pledge its interest in all or a portion of a System and/or a Lease and any amounts payable hereunder to any third party ("Assignee"). Lessee shall, if directed, pay all Rent and other amounts due to Assignee free from any claim or counterclaim, defense or other right which Lessee may have against Lessor. Lessor shall be relieved of its future obligations under the Lease as a result of such assignment if Lessor assigns to Assignee its interest in the System and Assignee assumes Lessor's future obligations. WITHOUT LESSOR'S PRIOR WRITTEN CONSENT, LESSEE SHALL NOT ASSIGN, SUBLEASE, TRANSFER, PLEDGE, MORTGAGE OR OTHERWISE ENCUMBER ("TRANSFER") ANY SYSTEM OR ANY LEASE OR ANY OF ITS RIGHTS THEREIN OR PERMIT ANY LEVY, LIEN OR ENCUMBRANCE THEREON. Any attempted non-consensual Transfer by Lessee shall be void ab initio. No Transfer shall relieve Lessee of any of its obligations under a Lease.

17. ORGANIZATION AND AUTHORITY: Lessee is duly organized, validly existing and in good standing under the laws of its State of formation and in any jurisdiction where a System is located. Lessee has the power and authority to execute, deliver and perform each Lease. The person executing this Agreement and any Schedules on behalf of Lessee has been given authority to bind the Lessee and each Lease constitutes or will constitute a legally binding and enforceable obligation of the Lessee. The execution, delivery and performance of each Lease is not and will not be in contravention of, or will not result in a breach of, any of the terms of Lessee's organizational documents, and any agreements, contracts or instruments to which Lessee is a party or under which it is bound.

18. NOTICES: Notices, demands and other communications shall be in writing and shall be sent by hand delivery, certified mail (return receipt requested), or overnight courier service, or facsimile transmission (effective upon transmission) with a copy sent by one of the foregoing methods, to Lessee at the address or facsimile number stated above and to Lessor at 501 Corporate Centre Drive, Suite 600, Franklin, Tennessee 37067, Attention: V.P. Finance, or facsimile no. (615) 771-6292. Notices shall be effective upon the earlier of actual receipt or four days after the mailing date. Either party may substitute another address by written notice.

19. JURISDICTION AND GOVERNING LAW: EACH LEASE SHALL BE GOVERNED BY THE LAWS OF THE STATE OF TENNESSEE AND THE LESSEE CONSENTS AND AGREES THAT, AT LESSOR'S OPTION, PERSONAL JURISDICTION, SUBJECT MATTER JURISDICTION AND VENUE SHALL BE WITH THE COURTS OF THE STATE OF TENNESSEE, OR THE FEDERAL COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

20. MISCELLANEOUS: (a) Any failure of Lessor to require strict performance by Lessee, or any waiver by Lessor of any provision of a Lease, shall not be construed as a consent to or waiver of any other breach of the same or of any other provision. (b) If there is more than one Lessee, the obligations of each Lessee are joint and several. (c) Lessee agrees to execute and deliver, upon demand, any documents necessary, in Lessor's reasonable opinion, to evidence the intent of a Lease, and/or to protect Lessor's interest in a System. Lessee appoints Lessor as its attorney-in-fact for the sole purpose of executing and delivering any UCC financing statements. Lessee agrees to pay Lessor's out-of-pocket costs of filing and recording such documentation. (d) Lessee shall deliver to Lessor such additional financial information as Lessor may reasonably request. (e) If any provision shall be held to be invalid or unenforceable, the validity and enforceability of the remaining provisions shall not in any way be affected or impaired. (f) In the event Lessee fails to pay or perform any obligations under a Lease, Lessor may, at its option, pay or perform such obligation, and any payment made or expense incurred by Lessor in connection therewith shall be due and payable by Lessee upon Lessor's demand with interest thereon accruing at the maximum rate permitted by law until paid. (g) Time is of the essence in each Lease. (h) Lessee shall pay Lessor, on demand, all costs and expenses, including reasonable attorneys' and collection fees, incurred by Lessor in enforcing the terms and conditions of a Lease or in protecting Lessor's rights and interests in a Lease or a System. (i) LESSOR INTENDS TO COMPLY WITH ALL APPLICABLE LAWS, INCLUDING THOSE CONCERNING THE REGULATION OF INTEREST. Therefore, no lease charge, late charge, fee or interest, if applicable, is intended to exceed the maximum amount permitted to be charged or collected by applicable law. If one or more of such charges exceed such maximum, then such charges will be reduced to the legally permitted maximum charge and any excess charge will be used to reduce the future Rent and/or the Price of the System or refunded. (j) Each Lease may be executed by one or more of the parties on any number of separate counterparts (which may be originals or copies sent by facsimile transmission), each of which counterparts shall be an original. (k) Each Lease constitutes the entire agreement between Lessor and Lessee with respect to the subject matter thereof and supercedes all previous writings and understandings of any nature whatsoever. (l) No agent, employee, or representative of Lessor has any authority to bind Lessor to any representation or warranty concerning any System and, unless such representation or warranty is specifically included in a Lease, it shall not be enforceable by Lessee against Lessor.

1. UNITED STATES BANKRUPTCY COURT
2. DISTRICT OF MINNESOTA
3. MINNEAPOLIS, MINNESOTA
4. In re:) Docket BKY 02-82361
5.)
6. TRICORD SYSTEMS, INC.,)
7.)
8. Debtor.)
9.)
10. JAMES BARTHOLOMEW, TRUSTEE,) Docket ADV 03-4174
11.)
12. Plaintiff,)
13.)
14. v.)
15.)
16. GENERAL ELECTRIC CAPITAL)
17. CORPORATION and ADAPTEC,)
18. INC.,) Minneapolis, Minnesota
19.) January 13, 2004
20. Defendants.) 10:00 a.m.

21. TRANSCRIPT OF TRIAL
22. BEFORE THE HONORABLE ROBERT J. KRESSEL
23. UNITED STATES BANKRUPTCY JUDGE

24. APPEARANCES:

25. For Plaintiff: SCOTT JOHNSON, ESQ.
Johnson Law Group
Suite 120
10801 Wayzata Boulevard
Minnetonka, Minnesota 55305
26. For Defendant General
Electric Capital Corporation: PAUL RATELLE, ESQ.
27. Fabyanske, Westra & Hart
28. Suite 1900
29. 800 LaSalle Avenue
30. Minneapolis, Minnesota 55402

31. (Appearances continued on page 2.)

32. WALLS & WALLS
33. Official Transcribers for U.S. Bankruptcy Court
34. 12124 Hampshire Avenue North
35. Champlin, Minnesota 55316
36. (763) 422-8938



1 telephone equipment?

2 A Oh, yes, there is. In this particular case with this
3 system, this is still a system which can be parted out or
4 broken down and sold. And some of its parts which have
5 been identified can be resold, and it does have a market.

6 Q Now, one of the terms in the lease which is at issue
7 concerns a sale for fair market value or the reasonable
8 estimate of fair market value at the time of the end of the
9 lease which would be I will represent to you would be
10 February of 2006. Did you undertake an evaluation of what
11 would be your opinion the fair market of the Nortel
12 equipment that is the subject of this lease as of February
13 2006?

14 A Yes, I did.

15 Q What steps did you take to do that, sir?

16 A We looked at again and five years from now what would
17 the support from the manufacturer for this product, and
18 with so many new products coming out and new software
19 packages coming out with the manufacturers trying to gain
20 more control over telecommunications, we found that the
21 best way to find value in this particular system which is a
22 Nortel Option 11C is by parting it out and there are
23 probably 4 or 5 components which have value after -- still
24 at about 60 months there are some parts that still have
25 value.

1 A Yes, that is correct, and also --

2 Q And did you for purposes of your evaluation, sir, did
3 you consider that the party that presently owns and
4 operates that system is the party that would be buying the
5 system?

6 A In this case, I am assuming that this system would be
7 just evaluated for its hardware components for resale to
8 anyone.

9 Q Okay, in the lease agreement, have you looked at any
10 of the provisions of the lease agreement in evaluating --
11 in providing your opinion?

12 A No, and in that -- in this particular case I am only
13 evaluating the hardware value and the system size, so I am
14 really not an official on lease or those type of procedures
15 or documents.

16 Q In the -- let me give you a copy of the --

17 THE COURT: Is this voir dire or cross-
18 examination?

19 MR. RATELLE: Yeah, well, what I am trying to --

20 THE COURT: It sounds a lot like cross-
21 examination to me.

22 MR. RATELLE: Okay, all right, let me -- let me
23 --

24 BY MR. RATELLE:

25 Q In the lease agreement, sir, the lease reads that the

1 purchase price shall be the "Installed fair market value."
2 Isn't fair to say that you did not determine the installed
3 fair marked value of this lease?

4 A The installed fair market value originally on the
5 installation of the system would include probably the
6 hardware, the software, and whatever other items were put
7 into the lease which could be installation, cabling, and
8 those items, but I am not in a position to evaluate those
9 -- just in a position to evaluate what I considered to be
10 the list price of the system which I have an approximate
11 list price of each of the two systems, and then each of
12 those components that would be -- components or the system
13 that would be readily saleable within probably 90 to a 120
14 days. That means it is resalable.

15 Q Is it true, sir, that you did not consider the
16 installed fair market value of this system?

17 A Upon its original installation, I do not have the
18 original total installation costs as it was originally
19 installed.

20 Q And in preparation for the opinion that you were asked
21 to render today, when you arrived at that opinion did you
22 consider the installed fair market value of that system at
23 the end of the lease term?

24 A I considered the value of the hardware not a formula
25 that comes -- that is used in a leasing document which may

1 THE COURT: So you have changed your objection
2 from foundation to relevance?

3 MR. RATELLE: Correct.

4 THE COURT: Overruled.

5 CONTINUED DIRECT EXAMINATION

6 BY MR. JOHNSON:

7 Q Mr. McAlister, what opinion -- did you arrive at an
8 opinion as to the fair -- what would be the fair market
9 value of this equipment in February of 2006 at the end of
10 the 60 month term?

11 A Yes, as our business denotes as we are resale -- yes
12 --

13 Q Just yes or no.

14 A Yes.

15 Q What is that opinion, sir?

16 A Would you like the --

17 MR. RATELLE: Objection, Your Honor.

18 I'm sorry.

19 Objection, Your Honor, foundation and relevance.

20 THE COURT: Overruled.

21 THE WITNESS: Would you like the dollar value for
22 that?

23 MR. JOHNSON: Yes, please.

24 THE WITNESS: Okay, there are two systems that I
25 evaluated in some detail here. One was -- one, let's

1 consider system one. System one is the one that had an
2 address at the top of my evaluation. It says, "2905
3 Northwest Boulevard, Suite 20, Plymouth, Minnesota" That
4 was the larger of the two systems and the value of hardware
5 for resale -- \$5,460.00.

6 BY MR. JOHNSON:

7 Q At the end of the 6 year -- 60 month term?

8 A Yes.

9 Q Okay, how about the other system?

10 A The other system was located at 1120 West 122nd
11 Avenue, Suite 300, Westminster, Colorado, we call it the
12 "Denver system." That is the little bit smaller of the
13 systems. It has less telephone stations as I had mentioned
14 before. That value of its hardware is \$4,200.00.

15 Q Was there any other value that you assigned to this
16 equipment besides the value of the hardware?

17 A No, because I determined that the hardware value,
18 after that period of time, that that would be the only
19 value because the manufacturer is not encouraging transfer
20 of ownership or encouraging a release -- reuse of a RTU
21 fee. They are encouraging resale of their new equipment.

22 Q Okay.

23 MR. JOHNSON: That's all I have.

24 Thank you.

25 THE COURT: Who wants to go first?

1 you to turn to the schedules that are attached to that
2 document -- just a second.

3 (Pause.)

4 MR. RATELLE: I ask indulgence of the Court. I
5 can look over the witness' shoulder, so the Court can have
6 a copy of what we're looking at here.

7 THE COURT: I would just as soon you wouldn't.
8 Somehow you need to examine from the lectern.

9 MR. RATELLE: Okay.

10 BY MR. RATELLE:

11 Q Exhibit A to this document refers to the original
12 equipment cost. Do you see that?

13 A Yes.

14 Q And there's also a charge for the installation cost of
15 that system, correct?

16 A Yes, correct.

17 Q And what's the number for the installation cost?

18 A \$16,920.00 on the Denver system.

19 Q Right. Does that seem reasonable to you as an
20 installation cost?

21 A I would say that would be, if it included wiring, yes,
22 that would be reasonable.

23 Q Okay, and then if you look at the next purchase
24 agreement in the Schedule A, this is the Minnesota system.
25 And, again, there's an installation cost for the Minnesota

1 system, do you see that?

2 A Yes, I do.

3 Q And what is the number associated with that?

4 A \$21,600.00.

5 Q Okay. And, again, that would be a reasonable estimate
6 of the installation costs of that system, correct?

7 A Yes, if it included wiring and cabling for that system
8 throughout the -- you know, in the building area that it
9 was installed.

10 Q So if we were to look at the numbers that you have
11 testified to, the \$5,460.00 and \$4,200.00 for the hardware,
12 and included the reasonable installation costs of those
13 systems, which combined equal approximately \$37,000.00,
14 then we would be looking at a value of this system
15 installed of about 47 -- \$46,000.00 correct?

16 A Okay, you're talking about both systems, one system.
17 Okay, so you're talking about your installation charges,
18 yes, that's correct.

19 MR. RATELLE: Your Honor, I'll offer Exhibit J.

20 THE COURT: Mr. Johnson?

21 MR. JOHNSON: Well, Your Honor, there's no
22 foundation, and it is hearsay. Oh, sorry, I'm sorry.
23 There is no foundation and it is hearsay. I've never
24 cross-examined Frontier. This was provided in discovery as
25 a document, but Mr. McAlister can't lay foundation for it.

1 Request for Admissions, is that right, Mr. Ratelle?

2 MR. RATELLE: Correct.

3 MR. JOHNSON: No objection, Your Honor.

4 THE COURT: Grant the motion then.

5 MR. RATELLE: Your Honor, GE calls Mr. Mark
6 Chabra.

7 (GE'S WITNESS, MARK CHABRA, SWORN)

8 DIRECT EXAMINATION

9 BY MR. RATELLE:

10 Q Mr. Chabra, could you please state your full name for
11 the record?

12 A Mark Chabra.

13 Q And, Mark, Mr. Chabra, how are you currently employed?

14 A I work for General Electric.

15 Q And what is -- what are your current job
16 responsibilities at General Electric?

17 A I'm responsible for managing a portfolio of
18 telecommunication equipment that's about \$85 million, and I
19 do set residuals for this equipment, and establish fair
20 market values for this equipment as well.

21 Q And are you familiar with the Meridian equipment
22 that's at issue in this case?

23 A Yes, I am. We currently have about \$50 million worth
24 of this equipment in the portfolio. We have different
25 levels of Meridian, the option 11C is a smaller version,

1 but we have systems as large as the 81C that are currently
2 manufactured by Nortel Networks.

3 Q Now with regard to leases of Meridian phone systems,
4 including the Option 11C PBX, are you familiar with the
5 retention rates, that is to say, the rate at which lessees
6 will elect to purchase equipment at the end of a 5-year
7 lease term?

8 A Currently, looking at the maturities for the last
9 year, we had retention rates of 85 percent of our customers
10 retaining this equipment at the maturity for 5-year-old
11 PBX's.

12 Q And how do the -- how do the -- at what percentage of
13 the purchase price of these systems do these lessees
14 typically purchase the equipment at the end of the lease
15 term?

16 A On average, 30 percent.

17 Q Now in this case, did GE retain a residual value for
18 the equipment?

19 A We booked a 21 percent residual, which is below our
20 current residual that we take on this type of equipment.

21 Q How does the residual reserved under the lease relate
22 to the rental rates under the lease?

23 A Well, the payment obviously is much lower, and we're
24 taking an equity position, you know, when we take a
25 residual, so, you know, in effect, we are giving the lessee

1 October of 2000 -- I'm sorry, in November of 2002, it's
2 true, is it not that the unpaid rental payments would have
3 to be paid, correct?

4 A Correct.

5 Q And under the terms of the lease agreement, that
6 dollar amount is determined at a present value of
7 approximately 5 percent, is that correct?

8 A Right, that is in the terms of the contract.

9 Q Okay. And if we assume that approximately \$165,000.00
10 of rental payments were unpaid as of November 13, 2002 --
11 I'm asking you to assume that -- that that present value
12 amount would be approximately \$150,000.00, correct?

13 A That's correct.

14 Q Now also due at that time would be remaining sales
15 tax. Is that correct?

16 A Yes.

17 Q Now in Minnesota and in Colorado, the sales tax rates
18 are different, correct?

19 A Correct.

20 Q And what do you recall is the sales tax rate in
21 Minnesota and the sales tax rate in Colorado?

22 A In Minnesota, it's 6 and 1/2 and in Colorado it's 8
23 and a quarter.

24 Q And does GE carry on its books and records a
25 calculation of that -- of the tax rate to apply to each

1 lease payment?

2 A Right. In each state in the country, we actually
3 track those different rates, and then, you know, calculate
4 the appropriate sales tax, you know, for each jurisdiction
5 and the equipment that is located there.

6 Q And for determining unpaid sales tax, as of November
7 13th of 2002, would it be appropriate -- if you look at
8 Stipulated Exhibit No. 1, which is up there -- to take the
9 remaining lease payments due under the lease and multiply
10 that times \$257.69?

11 A Well, it comes out to 257 based on the jurisdiction,
12 yes.

13 Q Okay. So if the tax -- if the lease were to be paid
14 off in full as of this date, would it be fair to simply
15 multiply \$257.69 times the number of unpaid lease payments
16 under the lease?

17 A That's correct.

18 Q And then you indicated that GE reserved approximately
19 21 percent of the purchase price under the lease or about
20 \$40,000.00, correct?

21 A Correct.

22 Q And that is an amount that would also -- sales tax
23 would also be applied to that, correct?

24 A Right.

25 Q And --

1 A And that is something we do reimburse back to the
2 state, so it's not something we keep, it's just, you know,
3 part of the process that is reimbursed on a yearly basis.

4 Q And under the terms of the lease, would the
5 appropriate amount of sales tax be approximately
6 \$13,500.00?

7 A Right.

8 MR. RATELLE: I have nothing further, Your Honor.
9 Thank you, Mr. Chabra.

10 THE COURT: Mr. Johnson?

11 MR. JOHNSON: No questions, Your Honor.

12 MR. MCCULLOUGH: No questions, Your Honor.

13 THE COURT: Thank you.

14 (Witness excused from the stand.)

15 MR. RATELLE: I have no further witnesses, Your
16 Honor.

17 THE COURT: You're resting?

18 MR. RATELLE: I'm resting, Your Honor.

19 THE COURT: Mr. McCullough?

20 MR. MCCULLOUGH: Adaptec rests, Your Honor.

21 THE COURT: Mr. Johnson, any rebuttal?

22 MR. JOHNSON: No, Your Honor.

23 THE COURT: Thank you.

24 I'll take this under advisement.

25 (Whereupon, the hearing in the above-entitled matter was

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Case No. 02-82361
Chapter 11 Case

Tricord Systems, Inc.,

Debtor.

James Bartholomew, as Trustee for the
Liquidating Trust of Tricord Systems,
Inc.,

Adv. Pro. No. 03-4174

Plaintiff,

vs.

General Electric Capital Corporation
and Adaptec, Inc.,

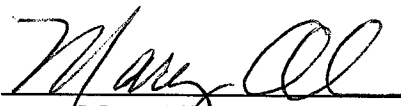
Defendants.

UNSWORN CERTIFICATE OF SERVICE

I, Mary Allen, employed by Fabyanske, Westra & Hart, P.A., attorneys licensed to practice law in this Court, with office address at 800 LaSalle Avenue, Suite 1900, Minneapolis, Minnesota 55402, declare under penalty of perjury that on **October 29, 2004**, I caused to be served by mail a true and correct copy of General Electric Capital Corporation's Memorandum of Damages and Affidavit of Michael A. Rosow, upon parties on the attached Service List, by faxing a true and correct copy thereof at the fax number(s) referenced thereon.

Executed on October 29, 2004

Signed: _____


(Mary Allen)

SERVICE LIST

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